

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**NATIONAL LABOR RELATIONS BOARD,**

**Petitioner,**

**v.**

**D2 ABATEMENT, INC., and PREMIER  
ENVIRONMENTAL SOLUTIONS, LLC,**

**Respondents.**

**BRIEF IN SUPPORT OF APPLICATION FOR  
ORDER ENFORCING SUBPOENAS DUCES TECUM**

The National Labor Relations Board (the Board), by General Counsel Richard F. Griffin, Jr.; Dennis R. Boren, its Regional Attorney for Region Seven; and Robert Buzaitis, Counsel for the Petitioner, respectfully requests this Honorable Court to issue an Order requiring Respondent D2 Abatement, Inc. (D2 Abatement) and Respondent Premier Environmental Solutions, LLC (Premier Environmental) to comply with the subpoenas duces tecum issued by the Board and directed to the respective Respondents.

**I. PROCEDURAL BACKGROUND**

This application arises out of an unfair labor practice investigation pending before the Board. The Board process leading to this proceeding began with unfair labor practice charges filed by the International Union of Painters and Allied Trades (IUPAT), a labor organization, on July 22, 2014 in Case 7-CA-133250, as amended on August 19, 2014; October 7, 2014; October 8, 2014; and October 29, 2014. IUPAT alleges, in part, that Respondents violated the Act by

creating a sham/alter ego company, failing and refusing to recognize a labor contract, and laying off unit employees in retaliation for their union activity.

In order to procure evidence on outstanding factual issues, on January 30, 2015, the Regional Director issued subpoenas duces tecum to the Custodians of Record for Respondent D2 Abatement (#B-1-KZFE0H, #B-1-KZFJZR, and #B-1-KZFGQJ) and Respondent Premier Environmental (#B-1-KZFZXX, #B-1-KZGCH1, and #B-1-KZFZDX) directing them to appear to produce documents and give signed sworn affidavit testimony on February 13, 2015, at 11:00 a.m. and 2:00 p.m., respectively, at the Board office for Region Seven, located at 477 Michigan Avenue, Room 300, Detroit, Michigan. Respondents' agents have failed to appear to produce documents, give testimony, or contact the Board to explain their failure to appear or to make arrangements to appear at a different date and/or time.

## **II. ARGUMENT**

### ***A. Respondents Have Failed to Timely Raise Any Objection to the Instant Subpoenas***

Section 102.31(b) of the Board's Rules and Regulations provides, in relevant part:

Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. All petitions to revoke subpoenas shall be served on the party at whose request the subpoena was issued. Such petition to revoke . . . shall be filed with the Regional Director . . .

Pursuant to this provision of the Board's Rules and Regulations, if Respondents did not intend to comply with the Board's January 30, 2015 subpoena, which were received on February 3, 2015, they were required to file a Petition to Revoke such subpoena by February 10, five business days after the February 3 receipt of the subpoena.

Respondents failed to file a petition to revoke either subpoena, as required under the Board's Rules and Regulations. Consequently, any asserted defense that may be posited at a hearing in this matter should not be considered. See *NLRB v. Bacchi*, 2004 WL 2290736, at \*3, citing *Maurice v. NLRB*, 691 F.2d 182, 183 (4<sup>th</sup> Cir.1982); *EEOC v. Cuzzens of Georgia, Inc.*, 608 F.2d 1062, 1064 (5<sup>th</sup> Cir.1979); *NLRB v. McDermott*, 300 B.R. 40, 46 (D.Colo.2003); *EEOC v. City of Milwaukee*, 54 F.Supp.2d 885, 891 (E.D.Wisc.1999); *EEOC v. County of Hennepin*, 623 F.Supp. 29, 31-32 (D.Minn.1985) and *EEOC v. Aerotek Inc.*, 7<sup>th</sup> Cir., No. 11-1349, unpublished opinion 1/11/13.

*B.     The Legal Standards Governing Issuance of Administrative Subpoenas by the Board*

In Section 11 of the National Labor Relations Act (29 U.S.C. § 161)(the Act), Congress provides the Board and its agents broad investigatory authority, including the power to subpoena any evidence “that relates to any matter under investigation or in question.” 29 U.S.C. § 161(1); see also *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7<sup>th</sup> Cir. 1991) (describing the Board's broad Section 11 powers); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 511 (4<sup>th</sup> Cir. 1996) (same); *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 15 (1<sup>st</sup> Cir. 1983) (same); *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 114 (5<sup>th</sup> Cir. 1982) (same). This broad subpoena power enables the Board “to get information from those who best can give it and who are most interested in not doing so.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). Thus, such subpoenas may be directed to any person having information relevant to an investigation. See, e.g., *Link v. NLRB*, 330 F.2d 437, 440 (4<sup>th</sup> Cir. 1964).

“For purposes of an administrative subpoena, the notion of relevancy is a broad one . . . . So long as the material requested ‘touches a matter under investigation,’ an administrative subpoena will survive a challenge that the material is not relevant.” *Sandsend Financial*

*Consultants, Ltd. v. Federal Home Loan Bank Board*, 878 F.2d 875, 882 (5<sup>th</sup> Cir. 1989) (citation omitted), and cases cited therein; *NLRB v. Carolina Food Processors, Inc.*, *supra* at 511; *NLRB v. Alaska Pulp Corp.*, 149 LRRM 2684, 2688 (D.D.C. 1995).

The Board's investigatory power "is not derived from the judicial function," but rather has been likened to that of a grand jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, *supra* at 642-643. See also *Link v. NLRB*, *supra* at 440; *NLRB v. Carolina Food Processors, Inc.*, *supra* at 511; *NLRB v. Alaska Pulp Corp.*, *supra* at 2688.

"The Board may issue subpoenas requiring both the production of evidence and testimony during the investigatory stages of an unfair labor practice proceeding." *NLRB v. North Bay Plumbing*, 102 F.3d 1005, 1008 (9<sup>th</sup> Cir. 1996). Accord *NLRB v. Carolina Food Processors, Inc.*, *supra* at 507. The courts have interpreted Section 11 to permit the Board to obtain "everything it [could] seek from an order compelling discovery" under the Federal Rules of Civil Procedure. *NLRB v. Interstate Material Corp.*, *supra*.

Investigations by the Board and other administrative agencies may be conducted both pre- and post-complaint. *NLRB v. Alaska Pulp Corp.*, *supra* at 2688 n.6; *Linde Thompson v. RTC*, 5 F.3d 1508, 1517-18 (D.C. Cir. 1993), and other cases cited therein. "Absent a governing statutory provision to the contrary, an [administrative] agency's authority to subpoena documents in support of an investigation survives the agency's filing of a civil lawsuit . . . ." *RTC v. Thornton*, 41 F.3d 1539, 1541 (D.C. Cir. 1994). The use of such subpoenas is appropriate, even after the commencement of proceedings, "because ongoing investigation might reveal information to underpin further charges." *Id.* at 1546, citing *RTC v. Walde*, 18 F.3d 943, 950 (D.C. Cir. 1994).

C. The Standard of Judicial Review Generally

The Court's role in reviewing the propriety of the subpoenas is narrow. "The Board's subpoena must be enforced so long as it is for a legitimate statutory purpose, the information sought is reasonably relevant to that purpose, and statutory procedures are observed." *NLRB v. Alaska Pulp Corp.*, *supra* at 2687. A district court should enforce the Board's subpoena "if the information sought is relevant to an investigation being conducted by the Board and is described with sufficient particularity." *NLRB v. Carolina Food Processors, Inc.*, *supra* at 507, and cases cited therein. See also *NLRB v. Frazier*, 966 F.2d 812, 815 (3<sup>rd</sup> Cir. 1992) (court must uphold such subpoena if it "is for a proper purpose, the information sought is relevant to that purpose, and statutory procedures are observed"). Further, the Court should defer to the agency's determination of relevance, accepting the "agency's own appraisal of relevancy . . . so long as it is not 'obviously wrong.'" *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1994).

Here, the Board issued subpoenas duces tecum to Respondents' respective custodians of record to appear before a Board agent to produce documents and give signed affidavit testimony relevant to the Board's investigation of the charge in Case 7-CA-133250. Such documents and signed sworn affidavit testimony is relevant for the Board's determination of whether Respondents have violated the Act.

D. The Documents and Testimony Sought Through the Subpoena Is Relevant to a Matter Under Investigation By the Board

The subpoena was issued as part of the Board's unfair labor practice investigation of the charge in Case 7-CA-133250 concerning whether Respondents violated the Act by unlawfully creating a sham/alter ego company, failing and refusing to recognize a labor contract, and laying off unit employees in retaliation for their union activity. The Respondents' documents and

testimony is necessary to determine the facts relevant to the allegations. This information will also assist the Region in determining whether there was a violation of the Act.

### **III. CONCLUSION**

WHEREFORE, the Board respectfully requests that the Court enter an order, pursuant to 12 U.S.C. § 3410(c), enforcing the subpoenas issued to Respondents.

Dated: February 25, 2015

By: National Labor Relations Board  
Richard F. Griffin, Jr., General Counsel

Dennis R. Boren, Regional Attorney

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